SUPREME COURT, U. S.

In The

Supreme Court of the United States

October Term, 1973

No. 73-1013

STONE & WEBSTER
ENGINEERING CORPORATION,
Petitioner,

v.

VIRGINIA ELECTRIC & POWER COMPANY,
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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December 28, 1973

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

QUESTION PRESENTED 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

CONCLUSION 7

APPENDIX

TABLE OF CITATIONS

Cases

Browne v. Strode, 5 Cranch 303, 3 L.Ed. 108 (1809) 6

Howard v. U.S., 184 U.S. 676 (1902) 6

Indiana v. Glover, 155 U.S. 513 (1895) 6

Kramer v. Caribbean Mills, Inc., 394 U.S. 823 (1969) 4

Maryland v. Baldwin, 112 U.S. 490 (1884) 6

McKay v. Citizens R. Trans. Co., 190 Va. 851, 59 S.E.2d 121 (1950) 5

McNutt for Use of Leggett v. Bland, 2 How. 9, 11 L.Ed. 159 (1844) 6

Susquehanna & Wyoming Valley Railroad & Coal Co. v. Blatchford, 11 Wall 172, 20 L.Ed. 179 (1870) 6

United States v. Aetna Cas. & S. Co., 338 U.S. 366 (1949) 5

Vance v. Maytag Sales Corp., 159 Va. 373, 165 S.E. 393 (1932) 5

Statutes

	Page
28 U.S.C. § 1254	2
28 U.S.C. § 1292	4
28 U.S.C. § 1332	2, 4
28 U.S.C. § 1359	4
Va. Code Ann. § 8-93.1 (Repl. Vol. 1957)	5

Miscellaneous

Fed. R. Civ. P. 10(a)	4
C. Wright, Law of Federal Courts, § 29 (2nd Ed. 1970)	6

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Stone & Webster Engineering Corporation prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on October 3, 1973.

OPINIONS BELOW

The opinion of the Court of Appeals (Ax. 1-13) is reported at 485 F.2d 73, affirming an unreported opinion of the United States District Court for the Eastern District of Virginia (Ax. 15-25).

JURISDICTION

The Court of Appeals' judgment (Ax. 14) dated October 3, 1973, was entered on that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Is diversity jurisdiction determined solely by citizenship of a nominal, representative plaintiff, ignoring non-diverse citizenship of a real party in interest who owns the claims in suit, will keep most if not all of any recovery, controls the litigation and is a named plaintiff, albeit a "use" plaintiff?

STATUTE INVOLVED

28 U.S.C. § 1332(a)(1) (Ax. 30-31) provides in relevant part:

> "§ 1332. Diversity of citizenship; . . .
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States; . . . ."

STATEMENT OF THE CASE

This action names "VIRGINIA ELECTRIC AND POWER COMPANY, WHO SUES FOR THE USE AND BENEFIT OF INSURANCE COMPANY OF NORTH AMERICA" as plaintiff against Westinghouse Electric Corporation ("Westinghouse") and Stone & Webster Engineering Corporation ("Stone & Webster"), defendants. Federal jurisdiction rests solely upon diversity of citizenship pursuant to 28 U.S.C. § 1332. Both Insurance Company of

North America ("INA") and defendant Westinghouse are citizens of Pennsylvania, and jurisdiction fails if the determination of diversity includes INA's citizenship, whether alone or with Virginia Electirc and Power Company ("Vepco").

INA instituted this action in the name of Vepco for the use and benefit of INA, seeking $2,190,000 for business interruption losses caused by fire in a generator at the Mt. Storm generating plant of Vepco, alleging negligence and breach of warranty by both Westinghouse, manufacturer of the damaged turbine, and Stone & Webster, engineers for construction of the plant.

Before suit, INA as insurer paid Vepco all but $200,000 of these losses, entering into a subrogation agreement with Vepco (Ax. 31-33), which provides in material part:

> "In consideration of and to the extent of said payment the undersigned hereby subrogates said Insurance Company, to all of the rights, claims and interest which the undersigned may have against any person or corporation liable for the loss mentioned above, and authorizes the said Insurance Company to sue, compromise or settle in the undersigned's name or otherwise all such claims and to execute and sign releases and acquittances and endorse checks or drafts given in settlement of such claims in the name of the undersigned, with the same force and effect as if the undersigned executed or endorsed them." (Ax. 31-32.)

In a subsequent action (C.A. No. 220-71-R, E.D. Va.) Vepco sued INA for the remaining $200,000, settled that claim and entered into an additional agreement (Ax. 34-35) subrogating INA to "all of its remaining rights of recovery" against Westinghouse and Stone & Webster arising out of the fire at Mt. Storm.

Since INA as plaintiff and defendant Westinghouse are

citizens of Pennsylvania, Stone & Webster moved (a) to dismiss for lack of jurisdiction and (b) for judgment on the pleadings. The District Court denied both motions (Ax. 27-28), certifying its order pursuant to 28 U.S.C. § 1292, and by order of January 8, 1973 the Court of Appeals granted an interlocutory appeal (Ax. 29).

The Court of Appeals affirmed, holding that Vepco is sole plaintiff—counting only its citizenship and excluding INA's citizenship (Ax. 1-14).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has expanded federal diversity jurisdiction contrary to decisions of this Court, the Federal Rules of Civil Procedure and applicable state law. In so doing, it entertained a legal fiction, turning its back on reality and encouraging subterfuge.

In short, the Court of Appeals decided that Vepco brought this action as sole plaintiff and is asserting INA's claims and Vepco's claims.

Hinging diversity jurisdiction upon such a fantasy subverts policy considerations underlying 28 U.S.C. § 1359 (forbidding collusive jurisdiction) and 28 U.S.C. § 1332 (establishing diversity jurisdiction) and this Court's decision in *Kramer* v. *Caribbean Mills, Inc.*, 394 U.S. 823 (1969).

Vepco, in its own right, is not named a party at all, while INA is named a party plaintiff. Fed. R. Civ. P. § 10(a). The Complaint names but one plaintiff—"VIRGINIA ELECTRIC AND POWER COMPANY, WHO SUES FOR THE USE AND BENEFIT OF INSURANCE COMPANY OF NORTH AMERICA"—automatically excluding Vepco for its own use and benefit. Even accepting Vepco's fictional presence, in no event can or does Vepco assert a claim for itself or, in any meaningful capacity, for INA.

From the beginning INA has owned almost $2,000,000 of the claims in suit, *United States* v. *Aetna Cas. & Surety Co.*, 338 U.S. 366 (1949), and by written agreements with INA, Vepco now expressly has transferred to INA "all of its remaining rights of recovery against Westinghouse Electric Corporation and/or Stone & Webster Engineering Corporation..." with "exclusive direction and control" of this action (Ax. 34, 37), leaving Vepco no claim to assert and no authority to act.

Most significantly there is not even colorable authority for Vepco to sue for INA on INA's claims. Quite the contrary, from the outset Vepco conferred upon INA sole power to release, compromise or settle the claims and authority to sue in Vepco's name (Ax. 31-32). Manifestly, INA sued,[1] not Vepco.

Not only did Vepco authorize suit by INA, only INA has a claim. See *Vance* v. *Maytag Sales Corp.*, 159 Va. 373, 382, 165 S.E. 393, 396 (1932); *McKay* v. *Citizens R. Trans. Co.*, 190 Va. 851, 59 S.E.2d 121 (1950). By statute in Virginia an insurer "... may either maintain a suit in the name of the holder of the legal title for his [its] use and benefit [which INA has done here] or in his [its] own name to enforce collection...." Va. Code Ann. § 8-93.1 (Repl. vol. 1957). But in either case it is a suit by the subrogee or assignee—"In either case the beneficial equitable owner [here INA] shall be deemed the real plaintiff and shall be alone liable for costs." *Id.*

Vepco, even if present, is incapable of preventing, controlling or concluding the litigation and is a bare "nominal" party or conduit through which INA asserts substantive claims; as the Court of Appeals held: "... INA has full and

[1] On oral argument in the Court of Appeals counsel for respondent openly stated that "INA brought this action."

exclusive control of the litigation." (Ax. 9.) In such circumstances, not only is Vepco not the sole jurisdictional plaintiff, it is a jurisdictional nonentity. See, *e.g., Maryland* v. *Baldwin,* 112 U.S. 490, 492 (1884); *Indiana* v. *Glover,* 155 U.S. 513 (1895).

> ". . . . Where the representative cannot prevent the institution or prosecution of the actions, or exercise any control over them, and is thus a mere conduit through whom the law affords a remedy to the persons aggrieved, the representative is treated as a nominal party, and the citizenship of the persons aggrieved is determinative." C. Wright, *Law of Federal Courts,* § 29 at 94 (2nd Ed. 1970), citing *Susquehanna & Wyoming Valley Railroad & Coal Co.* v. *Blatchford,* 11 Wall. 172, 177, 20 L.Ed. 179 (1870).

See *Browne* v. *Strode,* 5 Cranch 303, 3 L.Ed. 108 (1809); *McNutt for Use of Leggett* v. *Bland,* 2 How. 9, 11 L.Ed. 159 (1844); *Howard* v. *U.S.,* 184 U.S. 676 (1902).

Even if Vepco's citizenship counted, it was error to create diversity by excluding INA's citizenship. If collusive fantasy is not to expand diversity jurisdiction, substantive considerations must control, a policy followed consistently by this Court and the Congress. If substance controls, INA's citizenship must count—it owns over 90% of the claims in suit; it has "full and exclusive control of this litigation"; it will keep over 90% (if not all) of any recovery; it is a named plaintiff and indisputably brought this action.

Excluding INA excludes reality, the determinant of federal jurisdiction. If the Court of Appeals is correct, any non-diverse insurer can purchase diversity simply by disputing 7% of the insured's claim until after it sues a tortfeasor, as INA has done here. Also, any diverse insured's deductible claim opens the federal system to its non-diverse insurer.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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December 28, 1973

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 73-1212

Virginia Electric and Power Company, who sues for the use and benefit of Insurance Company of North America,

Appellee,

versus

Westinghouse Electric Corporation and Stone & Webster Engineering Corporation,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge.

(Argued June 4, 1973 Decided October 3, 1973).

Before HAYNSWORTH, Chief Judge, and CRAVEN and WIDENER, Circuit Judges.

James L. Sanderlin (Robert E. Payne, McGuire, Woods and Battle on brief) for Appellant Westinghouse Electric Corporation; Charles W. Laughlin (J. Edward Betts, Christian, Barton, Parker, Epps and Brent on brief) for Appellant Stone and Webster Engineering Corporation; Edward A. Marks, Jr., (Frank B. Miller, III, Albert M. Orgain, IV, and Sands, Anderson, Marks and Clark on brief) for Appellee.

CRAVEN, Circuit Judge:

Virginia Electric and Power Company (VEPCO) brought this action on April 16, 1969, on its own behalf and on behalf of its insurer and partial subrogee, Insurance Company of North America (INA), to recover damages resulting from the failure of one of VEPCO's power generating stations. The defendants are Westinghouse Electric Corporation, builder of the station, and Stone and Webster Engineering Corporation, the engineers. Jurisdiction was founded on diversity of citizenship under 28 U.S.C. § 1332.

The defendants moved to dismiss the action, urging that INA, by virtue of the subrogation, was the real party in interest under Fed. R. Civ. P. 17 and must prosecute the action as plaintiff. Since INA is a Pennsylvania corporation, its joinder as party plaintiff would destroy diversity jurisdiction and require dismissal because defendant Westinghouse is also a Pennsylvania corporation. Alternatively, the defendants urged that INA was an indispensable person who could not be made a party (because to do so would destroy diversity jurisdiction) and that under Fed. R. Civ. P.

19(b) the action should be dismissed. The district court denied the motion to dismiss and certified, under 28 U.S.C. § 1292(b), that a controlling question of law was involved as to which there existed a substantial ground for difference of opinion and that an immediate appeal would materially advance the litigation. We granted an interlocutory appeal to determine whether the district court properly concluded VEPCO could pursue this action for the entire loss and that the action could continue without joinder of INA. We think so, and affirm.

I.

On January 22, 1967, a failure occurred at VEPCO's Mount Storm Generating Station, resulting in alleged losses of approximately $2,200,000. There was in effect an insurance policy issued by INA securing VEPCO against the risk of additional operating costs due to physical damage or loss to facilities. The policy contained a $100,000 deductible clause. Pursuant to the policy, INA originally paid VEPCO $1,900,000.

VEPCO then brought this action on its own behalf for $200,000 (the $100,000 loss uninsured under the deductible provision of the insurance policy plus $100,000 alleged expediting expenses) and for $1,900,000 for its insurer, INA. VEPCO also instituted a separate action against INA for an alleged balance owing under the insurance policy of approximately $200,000. VEPCO and INA settled that action, and VEPCO received an additional $50,000 from INA, leaving VEPCO with an unreimbursed loss of $150,000. In consideration of the settlement, VEPCO and INA agreed that INA would furnish counsel and have exclusive control over the present action and that INA would prosecute VEPCO's claims for the remaining uninsured

loss.[1] Additionally, VEPCO executed a subrogation agreement whereby INA was subrogated to the rights of VEPCO against Westinghouse and Stone and Webster.[2]

The district court, construing the agreement of cooperation and the instrument of subrogation, found "that VEPCO has retained a pecuniary interest and that standing is retained by virtue of its intent to recover the uninsured loss." This finding is not contested on appeal. The district court then held that VEPCO as a real party in interest could proceed in the action to attempt to recover the full loss. The court concluded that INA was also a real party in interest and that the question of INA's joinder was to be determined under Rule 19. The district court found: (1) that nonjoinder would not prejudice the parties, (2) any danger of double claims against the defendants could be protected against by appropriate decrees;[3] (3) no other adequate

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[1] VEPCO executed a cooperation agreement which provided in part:

> Vepco also agrees that the conduct of the continuing action to recover against Westinghouse and/or S. & W. for such claims shall be under the exclusive direction and control of the Insurer. . . .
>
> (7) Vepco and I.N.A. further agree that counsel for I.N.A. shall represent its claims, if any, against Westinghouse and/or S. & W. for uninsured loss, claim for which is in the sum of $150,000.00, but it shall be under no obligation for costs and expenses incurred in the prosecution of such claims conjunctively with those to which I.N.A. is subrogated.

[2] The subrogation instrument provided in relevant part:

> . . . Vepco hereby subrogates the Insurer to all of its remaining rights of recovery against Westinghouse Electric Corporation and/or Stone & Webster Engineering Corporation . . . for the losses and claims and damages resulting from an occurrence on January 22, 1967, at its Mount Storm Power Station, Mt. Storm, West Virginia. . . .

[3] Counsel for INA has now represented to the court that INA is willing to execute an agreement binding it to any final judgment in this action. Brief for appellee at 22.

forum existed for the resolution of the dispute in view of the interstate character of the dispute and the problems involved in obtaining personal jurisdiction in a state court. The court determined that in equity and good conscience the action should proceed among the parties before it without joinder of INA.

II.

About the best that can be said for Fed. R. Civ. P. 17[4] is that it conveys a certain amount of correct information about naming plaintiffs. C. Wright, Law of Federal Courts § 70, at 293-94 (2d ed. 1970). Originally intended to incorporate the more permissive practice of equity to permit persons having an equitable or beneficial interest to sue in their own names, it is now thought by some commentators to serve only to confuse the already complex problems of determining whether diversity of citizenship exists. 6 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1541. Intended to expand the class of those who may sue

[4] Fed. R. Civ. P. 17(a) provides:

> (a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

to include persons having an equitable or beneficial interest, the rule is unfortunately susceptible to efforts to prevent prosecution of claims as illustrated by this appeal. Ingenious counsel are enabled to present yet another "decision point" resulting in extravagant expenditures of time and effort before ever reaching the merits. See J. Frank, American Law, The Case for Radical Reform 65 (1969).

"Rule 17(a) is a barnacle on the federal practice ship. It ought to be scraped away.... Rules 19, 17(b) and substantive rules as to stating a claim for relief are adequate without interjecting the meaningless, logically inconsistent commands of the real party in interest rule...." Kennedy, Federal Rule 17(a): Will the Real Party in Interest Please Stand?, 51 Minn. L. Rev. 675, 724 (1967).

The meaning and object of the real party in interest principle embodied in Rule 17 is that the action must be brought by a person who possesses the right to enforce the claim and who has a significant interest in the litigation.[5] Whether a plaintiff is entitled to enforce the asserted right is determined according to the substantive law. In a diversity action such as this one, the governing substantive law is the law of the state.[6] While the question of in whose name the action must be prosecuted is procedural, and thus gov-

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[5] 6 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1542, at 639, § 1543 at 643-44 (1971) [hereinafter cited as *Wright & Miller*]; 3A J. Moore, Federal Practice ¶ 17.02 at 53 (2d ed. 1970) [hereinafter cited as *Moore*].

[6] United States v. 936.71 Acres of Land, 418 F.2d 551 (5th Cir. 1969); Hoeppner Constr. Co. v. United States *ex rel.* Mangum, 287 F.2d 108 (10th Cir. 1960); *Moore*, ¶ 17.07 at 224-25. *See also* Travelers Indem. Co. v. Westinghouse Elec. Corp., 429 F.2d 77 (5th Cir. 1970); Standard Accident Ins. Co. v. Lohman, 295 F. 2d 161 (7th Cir. 1961).

erned by federal law, its resolution depends on the underlying substantive law of the state.[7]

In the present case it appears that VEPCO has both a sufficient interest in the litigation and is entitled under the substantive law to recover for the entire loss resulting from the failure of its generating station. VEPCO retained a significant pecuniary interest in the litigation. Thus this is not a case where an insurer-subrogee has paid an *entire* loss suffered by the insured and is the only real party in interest who must sue in his own name. *United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, 380-81 (1949).[8] In addition to having a sufficient interest in the litigation, VEPCO, as a subrogor, is entitled under the substantive law to bring suit for its entire loss.[9] VEPCO, being entitled to enforce the right, may bring this action even though INA will ultimately receive the major portion of any recovery.[10]

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[7] *Cf.* Gas Serv. Co. v. Hunt, 183 F.2d 417 (10th Cir. 1950).

[8] *See also* City Stores Co. v. Lerner Shops, 410 F.2d 1010 (D.C. Cir. 1969). Where an insured has been fully recompensed but appears as a party, the insured is a nominal party only. The insured's citizenship is not considered for purposes of diversity of citizenship, and upon timely motion the insurer-subrogee must be substituted as the party plaintiff. Link Aviation, Inc. v. Downs, 325 F.2d 613 (D.C. Cir. 1963). In the present case, the subrogation is only partial, and it is only the citizenship of the plaintiff, VEPCO, which is considered in determining diversity. C. Wright, Law of Federal Courts § 28-29 2d ed. 1970).

[9] Miller v. Tomlinson, 194 Va. 367, 73 S.E.2d 378 (1952); Glens Falls Ins. Co. v. Sherritt, 95 F.2d 823 (4th Cir. 1938); Carozza v. Boxley, 203 F. 673 (4th Cir. 1913). Va. Code Ann. § 38.1-32.2 (Supp. 1970) provides that an insurer-subrogee may bring suit in its own name, but this is permissive and does not prevent the subrogor from suing for the entire loss.

[10] *Wright & Miller*, § 1543, at 643-44. *See* Interstate Fire Ins. Co. v. Sayers, 468 F.2d 1361 (5th Cir. 1972); Jackson Mfg. Co. v. United States, 434 F.2d 1027 (5th Cir. 1970).

To allow VEPCO to maintain this action for the entire loss accords with the purposes of Rule 17. Under the common-law practice, a subrogee or assignee could enforce his rights only in the name of his subrogor or assignor. The original purpose of Rule 17 was to liberalize party rules, *i.e.*, to allow an assignee or subrogee to enforce his rights in his own name.[11] The permissive function of Rule 17 has been accomplished, and Rule 17 now serves primarily a negative function. It is to enable a defendant to present defenses he has against the real party in interest, to protect the defendant against a subsequent action by the party actually entitled to relief, and to ensure that the judgment will have proper res judicata effect.[12] In view of its current purpose, to protect defendants against subsequent suits, Rule 17 will not bar a suit by a real party in interest which will have the effect of preventing a multiplicity of suits.[13]

Where there is partial subrogation, there are two real parties in interest under Rule 17. Either party may bring suit—the insurer-subrogee to the extent it has reimbursed the subrogor, or the subrogor for either the entire loss or only its unreimbursed loss. If either the subrogor or subrogee brings suit, joinder is often appropriate upon proper

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[11] Notes of Advisory Committee on Rules, Fed. R. Civ. P. 17, U.S.C.A. at 16.

[12] Celanese Corp. v. John Clark Indus., Inc., 214 F.2d 551 (5th Cir. 1954). *See generally* United Fed'n of Postal Clerks, AFL-CIO v. Watson, 409 F.2d 462, 470-71 n.34 (D.C. Cir.), *cert. denied,* 396 U.S. 902 (1969).

[13] United Fed'n of Postal Clerks, AFL-CIO v. Watson, 409 F.2d 462, 470 (D.C. Cir.), *cert. denied,* 396 U.S. 902 (1969). It is urged that INA is already a party to the litigation by virtue of its being named a use plaintiff and because of the presence of its counsel. We think neither factor makes INA a party and that VEPCO may properly represent INA. *See* cases cited note 9 *supra.*

motion by the defendant.[14] But joinder is not appropriate, and certainly not required by Rule 17, for the purpose of destroying diversity jurisdiction and requiring dismissal. Even without joinder the partial-subrogee is generally precluded from bringing a subsequent action against the defendants where a judgment has been rendered in a suit by the subrogor for the entire loss.[15] Multiplicity of suits, one by the subrogor for his loss and one by the subrogee for the reimbursed loss, is thus prevented as fully as if joinder were compelled.

In the present case INA will clearly be precluded from subjecting Westinghouse and Stone and Webster to further suits. Under the cooperation agreement between VEPCO and INA filed with the court, INA has full and exclusive control of the litigation. It is settled under the applicable substantive law that any judgment will have full res judicata effect as to INA in these circumstances.[16]

Thus we conclude that the district court properly allowed the suit to continue with VEPCO as the party plaintiff. "It would result in unnecessary hardship and confusion to hold that such a company [as INA], entitled to partial subrogation, . . . must go into a state court and try over again issues

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[14] *Aetna*, 338 U.S. at 381-82; Kansas Elec. Power Co. v. Janis, 194 F.2d 942, 944 (10th Cir. 1952); National Garment Co. v. New York, C. & St. L. R.R., 173 F.2d 32 (8th Cir. 1949).

[15] Joyner v. F & B Enterprises, Inc., 448 F.2d 1185 (D.C. Cir. 1971). Under substantive law the partial subrogee may be collaterally estopped from bringing a subsequent action and any recovery by the subrogor is impressed with a trust in favor of the subrogee. *See* Braniff Airways, Inc. v. Falkingham, 20 F.R.D. 141 (D. Minn. 1957). Also, as here, the subrogee may agree to be bound by the judgment. Urrutia Aviation Enterprises, Inc. v. B. B. Burson & Assoc., 406 F.2d 769 (5th Cir. 1969).

[16] Patterson v. Saunders, 194 Va. 607, 74 S.E.2d 204, *cert. denied*, 345 U.S. 998 (1953).

that [will be] settled in the federal court. There is nothing in modern practice which sanctions any such absurdity." *Virginia Electric & Power Co.* v. *Carolina Peanut Co.*, 186 F.2d 816, 821 (4th Cir. 1951).

As noted, the modern function of Rule 17 is to prevent the defendant from being subjected to subsequent suits. In *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968), the Court stated that one of the primary considerations under Rule 19 in whether to allow a suit to continue where a party cannot be joined is the protection of a defendant from multiple litigation, or inconsistent relief. 390 U.S. at 10. In view of this overlap between Rule 17 and Rule 19, we think the emphasis in a case such as this should be on whether under Rule 19 the action should be allowed to continue without joinder of the absent party.[17] That an absent person who cannot be joined is a real party in interest does not conclude the matter—the court must determine whether, in equity and good conscience, the action should proceed without the person.[18]

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[17] *See* Gargis v. B. F. Goodrich Co., 386 F.2d 534 (3d Cir. 1967); Hoeppner Constr. Co. v. United States *ex rel.* Mangum, 287 F.2d 108 (10th Cir. 1960); Peoples Loan & Finance Corp. v. Lawson, 271 F.2d 529 (5th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960); Celanese Corp. v. John Clark Indus., Inc., 214 F.2d 551 (5th Cir. 1954); Potomac Elec. Power Co. *ex rel.* Royal Indem. Co. v. Babcock & Wilcox Co., 54 F.R.D. 486 (D. Md. 1972); Maryland *ex rel.* Geils v. Baltimore Transit Co., 37 F.R.D. 34 (D. Md. 1965).

[18] C. Wright, Law of Federal Courts § 70, at 296 (2d ed. 1970).

III.

It is clear that a partial subrogee is a person to be joined if feasible under Fed. R. Civ. P. 19(a).[19] *United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, 381-82 (1949). However, here the partial subrogee, INA, cannot be joined without destroying diversity jurisdiction, and Rule 19 by its own terms exhibits concern that the courts not be deprived of jurisdiction by unnecessary joinder. Fed. R. Civ. P. 19(a). In such a case the court must consider the four factors enumerated in Rule 19(b)[20] to determine whether

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[19] Fed. R. Civ. P. 19(a) provides:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

[20] Fed. R. Civ. P. 19(b) provides:

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in

in equity and good conscience the action should proceed, or should be dismissed, the absent person being regarded as indispensable. "Whether a person is 'indispensable,' that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation." *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102, 118 (1968).

A review of the four interests which must be considered by the district court in its discretion demonstrates that the court below properly allowed the action to continue without joinder of INA. First, it is difficult to see how a judgment in this action might be prejudicial to either INA or the parties before the court. INA has control of the litigation and the opportunity to fully litigate its derivative rights arising out of subrogation. The defendants have failed to show how they would be prejudiced on the merits by nonjoinder of INA. Second, if any prejudice were shown, it can be avoided by the shaping of relief. Third, it is clear that a judgment rendered in INA's absence will be fully adequate to protect both INA and the parties and the public interest in the termination of disputes on the merits. The defendants have not sought any affirmative relief against VEPCO and do not suggest they would seek affirmative relief against INA if it were joined. Also because of INA's control of the suit, it will be bound by any judgment in favor of the defendants.[21] Fourth, it is not clear that plaintiff would have

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the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

[21] Patterson v. Saunders, 194 Va. 607, 74 S.E.2d 204, *cert. denied,* 345 U.S. 998 (1953).

an adequate remedy in the courts of either Virginia or another state against both Stone and Webster and Westinghouse.[22] INA, the partial subrogee, is thus clearly not an "indispensable" party to this litigation. *See United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, 382n.19 (1949); *Peoples Loan & Finance Corp.* v. *Lawson*, 271 F.2d 529, 532 (5th Cir. 1959), *cert. denied*, 362 U.S. 903 (1960). The district court below correctly allowed the action to continue without joinder of INA.[23]

Accordingly, for the reasons stated, the decision of the district court is

AFFIRMED.

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[22] It further appears that commencement of suit in another court may now be barred by the statute of limitations. 7 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1608, at 80 (1972).

[23] *See Moore*, ¶ 19.14[1]; 7 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1608 (1972).

Ax. 14

JUDGMENT

FOR THE FOURTH CIRCUIT

No. 73-1212

Virginia Electric and Power Company, who sues for the use and benefit of Insurance Company of North America,

Appellee,

vs.

Westinghouse Electric Corporation and Stone & Webster Engineering Corporation,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

Filed Oct. 3, 1973.

William K. Slate, II, Clerk.
A True Copy, Teste:
William K. Slate, II, Clerk
By .....
Deputy Clerk

William K. Slate, II
Clerk

Ax. 15

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

CIVIL ACTION No. 147-69-R

VIRGINIA ELECTRIC AND POWER COMPANY,
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA

v.

WESTINGHOUSE ELECTRIC CORPORATION AND
STONE & WEBSTER
ENGINEERING CORPORATION

MEMORANDUM

Filed November 3, 1972

Plaintiff brings this suit for damages arising out of the failure of the Mount Storm Power Generating Station on January 22, 1967. Jurisdiction is alleged by virtue of 28 U.S.C. § 1332.

The basic facts are as follows:

Plaintiff, Virginia Electric and Power Company, hereinafter referred to as VEPCO, secured a policy with Insurance Company of North America, hereinafter referred to as INA, insuring it against risk of additional operating costs due to physical damage or loss to facilities. The policy contained a $100,000 deductible clause. On January 22, 1967, VEPCO, as the result of an occurrence at its Mount Storm Power Generating Station, suffered alleged losses of $2,212,428.00. INA, pursuant to the policy, paid

VEPCO $1,990,000. (VEPCO instituted a separate action for the alleged balance owing of $222,528 less applicable deductions, *infra*). Also pursuant to the contract, INA became subrogated to the rights of VEPCO on any claims of the latter against those who might be sued by VEPCO for the generator loss. Plaintiff VEPCO filed this action on behalf of itself for $200,000 damages (the $100,000 deductible amount plus $100,000 alleged expediting expenses) and its salvagee, INA, for $1,900,000 against Westinghouse Electric Corporation, hereinafter referred to as Westinghouse, the builder of the station, and Stone and Webster Engineering Corporation, the engineers.

This history of prior pleadings of the action herein is long and complex. The action was commenced by a complaint filed under the style of *Virginia Electric and Power Company, for the use and benefit of Insurance Company of North America* v. *Westinghouse Electric Corporation and Stone & Webster Engineering Corporation,* the jurisdictional averments of which claim that diversity of citizenship exists between VEPCO and each of the defendants.

To this complaint, Westinghouse filed an answer in which it denies the jurisdictional averments of the complaint and, as its tenth defense, alleges that INA is the real party in interest which must prosecute the claim in its own name and accordingly be joined as a party plaintiff. Additionally, the pleading contained a cross-claim against Stone & Webster Engineering Corporation, hereinafter referred to as Stone & Webster, under which Westinghouse sought to recover on two counts. The first count alleged that the negligence of Stone & Webster was primary, active and affirmative whereas any fault on the part of Westinghouse was passive and secondary, as a result of which it sought indemnity from Stone & Webster. In Count Two of the

cross-claim, it sought to recover over against Stone & Webster on certain additional items upon similar allegations thereto.

In its responsive pleading to the original complaint, Stone & Webster filed a four count cross-claim against Westinghouse in which it alleged that its liability, if any, to the plaintiff was the result of the primary, active and affirmative fault of Westinghouse and that it would be entitled to indemnity from Westinghouse accordingly. In the Second Count of this cross-claim Stone & Webster alleges that certain contractual obligations between it and Westinghouse pertinent to the matters herein would provide indemnity against any loss existing from this litigation. In its Third Count, Stone & Webster alleges certain express warranties running from Westinghouse to it, the breach of which is claimed to have caused the loss. In its Fourth Count it relies upon implied warranties running to it from Westinghouse covering the machinery and equipment involved in the litigation.

Additionally, Stone & Webster filed as a part of its response a counterclaim against VEPCO based upon an alleged contract between them, and sought indemnity from VEPCO with respect thereto.

Each of the defendants responded affirmatively to the crossclaims mentioned. Accordingly, we now have a situation in which the original complaint seeks relief against both Westinghouse and Stone & Webster; they in turn seek relief against each other; Stone & Webster additionally seeks relief against VEPCO, which VEPCO resists.

On February 1, 1971, the Court filed two orders dealing with thirteen motions previously raised which grew out of the above recited case history. The abundant motion practice herein has yet to subside and the parties are before the Court on the following:

1. Motion by Stone & Webster for judgment on the pleadings on the basis that the complaint fails to state a claim upon which relief can be granted;

2. Motion by Stone & Webster to dismiss because VEPCO allegedly split its cause of action against Stone & Webster;

3. Motion by Westinghouse to dismiss on the ground VEPCO allegedly splits its cause of action against Westinghouse;

4. Motion by Stone & Webster to dismiss for want of proper diversity jurisdiction;

5. Additionally, INA has moved the Court to consolidate or jointly try the above-styled action with VEPCO v. INA, Civil Action No. 220-71-R, in which VEPCO originally sought an alleged balance owing under the above described insurance policy and in which Stone & Webster and Westinghouse have been sued by INA as Third Party Defendants on a theory of indemnification.

Subsequent to the filing of said motions, VEPCO and INA settled their controversy in VEPCO v. INA, etc., Civil Action No. 220-71-R, over the alleged balance of $222,428 owing on the aforementioned policy. Pursuant to said settlement, the parties entered into a release and contract of subrogation with regard to the further litigation remaining in Civil Action No. 220-71-R and the action herein. Those agreements have been filed in both actions.

The Court will address itself first to Stone & Webster's motion to dismiss.

Stone & Webster contends that INA is the proper party plaintiff and that as a result of the aforementioned settlement in Civil Action No. 220-71-R VEPCO has no remaining interest in the action herein. Accordingly, Stone &

Webster argues that INA should be made the proper party plaintiff. If said contention were sustained, diversity jurisdiction would fail (both Westinghouse and INA are Pennsylvania corporations) under the complete diversity rule of *Strowbridge* v. *Curtiss,* 3 Cranch 267 (1806). [sic].

Prior to the VEPCO-INA settlement, Stone & Webster contended that INA, as a partial subrogee of VEPCO's total claim against the defendants, was a proper party plaintiff and in the least a "use plaintiff" which, pursuant to Rule 17(a), F.R.C.P., should prosecute the action. Similarly, if this contention were upheld and INA joined as a proper party plaintiff, diversity jurisdiction would fail.

In support of its contention that VEPCO is without further standing to prosecute this action, Stone & Webster has placed in the record the agreements appurtenant to the VEPCO-INA settlement. The *Instrument of Subrogation* thereto reads, *inter alia,* as follows:

> Now, in consideration of the payment by the Insurer to Vepco of the said sum of Two Million Sixty-two Thousand Four Hundred Twenty-eight ($2,062,-428.00) Dollars, in settlement of its liability under the insurance policy issued to Vepco, *Vepco hereby subrogates the Insurer to all of its remaining rights of recovery against Westinghouse Electric Corporation and/or Stone & Webster Engineering Corporation* (being those to which other insurers have not been previously subrogated) (See C.A. No. 5596-R) *for the losses and claims and damages resulting from an occurrence on January 22, 1967,* at its Mount Storm Power Station, Mt. Storm, West Virginia, which claims are more fully referred to and described in the various pleadings in the aforesaid Civil Action No. 220-71-R. (Emphasis supplied by the Court.)

In response VEPCO has asserted that said settlement while adding an additional $50,000 to its insurance recovery, still left it with a $150,000 balance of uninsured expenses arising from the Mt. Storm incident, the genesis of this exercise in pleading practice. VEPCO claims that its interest in this action is retained by virtue of said balance which it seeks to recover from the defendants. In support of its contention, VEPCO relies on its Agreement of Cooperation with INA which reads in part:

> (7) Vepco and I.N.A. further agree that counsel for I.N.A. shall represent its claims, if any, against Westinghouse and/or S. & W. for uninsured loss, claim for which is in the sum of $150,000.00, and it shall be under no obligation for costs and expenses incurred in the prosecution of such claims conjunctively with those to which I.N.A. is subrogated.

Although the above quoted language appears to contradict the Instrument of Subrogation, *supra,* the Court nevertheless concludes that VEPCO has retained a pecuniary interest and that standing is retained by virtue of its intent to recover the uninsured loss.

The question remains, therefore, whether INA, as a partial subrogee, should be joined herein.

The Court is offered guidance on this matter by a substantial body of case law, both in federal and Virginia courts. While questions of proper parties in federal courts are ultimately determined on the basis of federal rules and procedures, "state law questions may arise in determining what interest the outsider actually has . . ." *Provident Bank* v. *Patterson,* 390 U.S. 102, 125 (1967); see Wright, *Federal Courts* (2nd edition 1970), at 301. Accordingly, the Court relies in part on Virginia state law.

Stone & Webster contends, and the Court concurs, that

a partial subrogee is a real party in interest. Both the Virginia Supreme Court of Appeals and the United States Supreme Court have upheld this principle. See *Brighthope Rwy. Co.* v. *Rogers,* 76 Va. 443 (1881); *U.S.* v. *Aetna Cas. & S. Co.,* 338 U.S. 366 (1949).

Plaintiff concedes that this principle of law may in fact be correct, but nevertheless asserts that defendant has (1) no right to either demand that the action be brought by the subrogee, or (2) to compel joinder. As authority for the first proposition, plaintiff cites *Matthews* v. *Allstate Ins. Co.,* 194 F. Supp. 459 (1881), [sic], and *Miller* v. *Tomlinson,* 194 Va. 367 (1952), both of which deal with § 8-94 Va. Code 1950. That section allows assignees or beneficial owners of claims to sue in their own names, and the cited cases reflect that the section is designed to benefit assignees and not to allow defendants to compel suit by certain plaintiffs. The Court concludes, however, that the issue is properly one of joinder under Rule 19, F.R.C.P., and as a procedural issue, federal law ultimately governs. *Provident Bank, supra,* at 125, f.n. 22.

The Court's determination that INA is a real party in interest is not determinative of the joinder issue per se:

> Once the requirements of Rule 17 have been complied with, and it has been decided that a particular individual or entity is a party in interest with capacity to sue or be sued, it is necessary to go one more step and decide whether the person has such a strong interest in the litigation that his joinder ought to be compelled. Wright, *Federal Courts,* (2d ed.) at 296.

The guidelines for compelling joinder are set forth in Rule 19, F.R.C.P.:

Ax. 22

Rule 19

Joinder Of Persons Needed For Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties, second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

The broad discretion afforded the trial courts under Rule 19 to fashion appropriate remedy has been approved in *Provident Bank, supra.* This Court is thus left to "balance the equities" in disposing of this matter. Again the Court finds Wright, *supra,* helpful:

> If the absentee is needed for just adjudication and is not subject to process or his joinder would destroy diversity, Rule 19(b) states the factors to be considered in deciding whether to proceed in his absence or to dismiss the action. The ultimate question is whether "equity and good conscience" permit the action to proceed, but in deciding this the court is required to weigh whether judgment in the absence of the person would prejudice him or those already parties, what protective provisions in the decree might lessen or avoid this prejudice, whether a judgment rendered in the person's absence will be adequate, and whether the plaintiff will have a satisfactory remedy if the action is dismissed.

This Court finds that nonjoinder will not prejudice the parties as all interests are represented by the present parties. There is some question, however, as to whether nonjoinder will expose the defendants to double claims. That issue arises by virtue of the present status of Civil Action No. 220-71-R.

In that action, VEPCO sued INA for the balance owing on the insurance payout. INA filed a third party complaint against Stone & Webster and Westinghouse alleging essentially the same causes of action as those set forth by the plaintiff herein. The settlement consummated in Civil Action No. 220-71-R left only the third party causes of action, which causes Stone & Webster has moved to dismiss. That motion is now under advisement pending the submission of further memoranda.

At this juncture the Court is disposed, under the Rule 19 standards, to permit prosecution of the action herein. Any danger of double claims will be appropriately weighed by the Court in its final disposition of the motion to dismiss now pending in Civil Action No. 220-71-R. Suffice it to say that INA's interest is now represented in these actions as a partial subrogee.

The overriding factor in the Court's discretionary refusal to compel joinder is the Court's conclusion that the parties have a right to a forum in which to settle their controversies. While the parties may possibly begin re-litigation of the matters herein in Pennsylvania courts, problems of jurisdiction over the non-state parties, VEPCO and Stone & Webster, who are essential to the litigation, may render such efforts fruitless or ineffectual. This conclusion follows from the fact that the case is essentially interstate in character. Joinder of INA will therefore not be compelled. Accordingly, the motion to dismiss on the ground of lack of diversity jurisdiction must be denied.

INA's motion to consolidate the cases will be kept under advisement until a ruling be made on the motions to dismiss now pending in Civil Action No. 220-71-R.

The remaining motions may be disposed of with little comment.

Stone & Webster's motion based on an alleged failure to state a cause of action, will be denied, for examination of the complaint reveals sufficient content to put the alleged causes of action in issue.

The motions by Stone & Webster and Westinghouse to dismiss by reason of VEPCO having allegedly split its causes of action will likewise be denied. A similar motion to this effect was filed with the Court on April 29, 1970, and the

reasons stated by the Court at that time are no less viable now.[1]

An appropriate order shall issue. •

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: 11-3-72

[1] See the Court's order of February 1, 1971.

Ax. 26

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 147-69-R

VIRGINIA ELECTRIC AND POWER COMPANY, etc.

v.

WESTINGHOUSE ELECTRIC CORPORATION, et al

ORDER
Filed November 21, 1972

Defendants Westinghouse and Stone and Webster have moved the Court to amend its order of November 3, 1972, to include a statement that the Court finds that the determination therein involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation; and further, that upon said ground that the Court certify the matters therein for interlocutory appeal pursuant to 28 U.S.C. § 1292.

It appearing that the ends of justice might best be served thereby, and deeming it just and proper so to do, it is so ORDERED.

Let the Clerk send copies of this order to all counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: November 21, 1972

Ax. 27

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 147-69-R

VIRGINIA ELECTRIC AND POWER COMPANY,
who sues for the use and benefit of
INSURANCE COMPANY OF NORTH AMERICA

v.

WESTINGHOUSE ELECTRIC CORPORATION and
STONE & WEBSTER ENGNEERING
CORPORATION

ORDER

Filed November 3, 1972

In accordance with the memorandum of the Court this day filed, and deeming it just and proper so to do, it is Adjudged and Ordered that:

1. The motion on behalf of Stone & Webster to dismiss for lack of diversity jurisdiction be, and the same is hereby, denied.

2. The motion on behalf of Stone & Webster to dismiss for failure to state a claim upon which relief can be granted be, and the same is hereby, denied.

3. The motions on behalf of Stone & Webster and Westinghouse to dismiss on the ground that Vepco split its cause of action be, and the same are hereby, denied.

4. The motion on behalf of INA to consolidate C.A. 220-71-R with the action herein is taken under advisement.

Let the Clerk send copies of the memorandum and this order to counsel of record.

/s/ Robert R. Merhige, Jr.
United States District Judge

Date: 11-3-72

Ax. 29

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Nos. 72-8035, 72-8036

Virginia Electric and Power Company, who sues for the use and benefit of Insurance Company of North America

Appellant [sic]

versus

Westinghouse Electric Company [sic] and Stone & Webster Engineering Corporation

Appellee [sic]

ORDER GRANTING APPEAL

Filed January 8, 1973

In this diversity action an interlocutory appeal is sought pursuant to 28 U.S.C. § 1292b. The question was properly certified by the district court below.

The district court order appealed from is a determination of proper parties under Fed. R. Civ. P. 17 & 19. Should the district court determination be reversed, the jurisdiction of the district court would fall for lack of complete diversity. Thus this is the type of interlocutory appeal which might avoid protracted and expensive litigation. *See United States Rubber Co.* v. *Wright*, 359 F.2d 784 (9th Cir. 1966).

Also the question certified is one as to which there is a substantial ground for difference of opinion. A result opposite from that below was reached in *Potomac Elec. Power Co.* v. *Babcock & Wilcox Co.*, 54 F.R.D. 486 (D. Md. 1972).

The requirements of 28 U.S.C. § 1292b having been satisfied, the petition for an interlocutory appeal will be granted.

For the Court

/s/ J. Braxton Craven, Jr.
United States Circuit Judge

28 UNITED STATES CODE §1332

Diversity of citizenship; Amount in controversy; costs.

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof; and

(3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title, a corporation shall be deemed a citizen of any State by which it has been incorporated and of the State where it has its principal place of business: *Provided further,*

That in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico, June 25, 1948, c. 646, 62 Stat. 930; July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445.

28 U.S.C. § 1332, Vol. 7 at pp. 7566-77 (1970 ed.)

SUBROGATION RECEIPT

January 16, 1968

Received of the Insurance Company of North America Insurance Co., the total of One Million Nine Hundred Ninety thousand and 00/100 Dollars ($1,990,000.00) in full settlement of all claims and demands of the undersigned for loss and damage by electrical fault and Supplemental & Partial mechanical breakdown occurring on the 22nd day of January A.D. 1967, to the property described in Policy No. CX 10X196 issued through the Davenport Agency of said Company.

In consideration of and to the extent of said payment the undersigned hereby subrogates said Insurance Company, to all of the rights, claims and interest which the undersigned may have against any person or corporation liable for the loss mentioned above, and authorizes the said Insurance Company to sue, compromise or settle in the undersigned's

name or otherwise all such claims and to execute and sign releases and acquittances and endorse checks or drafts given in settlement of such claims in the name of the undersigned, with the same force and effect as if the undersigned executed or endorsed them.

Warranted no settlement has been made by the undersigned with any person or corporation against whom a claim may lie, and no release has been given to anyone responsible for the loss, and that no such settlement will be made nor release given by the undersigned without the written consent of the said Insurance Company and the undersigned covenants and agrees to cooperate fully with said Insurance Company in the prosecution of such claims, and to procure and furnish all papers and documents necessary in such proceedings and to attend court and testify if the Insurance Company deems such to be necessary but it is understood the undersigned is to be saved harmless from costs in such proceedings.

In Witness Whereof he has hereto set his hand and seal this 16th day of January 1968.

Witness:

.....

.....

..... (L.S.)

Virginia Electric & Power Company

By /s/ G. A. Spencer—Treasurer

(Notarization to be completed on losses where local law requires it.)

Ax. 33

For Individuals

State of Virginia
City of Richmond ss:

On the ..... day of ....., 19..... before me came ..... to me known to be the individual described in, and who executed, the foregoing instrument, and acknowledged that ..... executed the same.

Exhibit A

.....

Notary

For Corporations

State of
County of ss:

On the 16th day of January, 1968 before me came ..... to me known, who, being by me duly sworn, did depose and say that he resides in Richmond; that he is the Treasurer of Virginia Electric & Power Co. the corporation described in, and which executed, the foregoing instrument; that he knows the seal of said corporation, that the seal, affixed to said instrument is such corporate seal, that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

/s/ Illegible

Notary

Ax. 34

INSTRUMENT OF SUBROGATION

Filed October 2, 1972

The claims of Virginia Electric and Power Company (hereinafter "Vepco") against Insurance Company of North America (Policy No. CX-10-X-196) (hereinafter the "Insurer") asserted against the Insurer in Civil Action No. 220-71-R in the United States District Court for the Eastern District of Virginia, Richmond Division, having been fully and finally settled and compromised as fully stated in Release Agreement of even date herewith between Vepco and the Insurer for the sum of Two Million Sixty-two Thousand Four Hundred Twenty-eight ($2,062,428.00) Dollars.

Now, in consideration of the payment by the Insurer to Vepco of the said sum of Two Million Sixty-two Thousand Four Hundred Twenty-eight ($2,062,428.00) Dollars, in settlement of its liability under the insurance policy issued to Vepco, Vepco hereby subrogates the Insurer to all of its remaining rights of recovery against Westinghouse Electric Corporation and/or Stone & Webster Engineering Corporation (being those to which other insurers have not been previously subrogated) (See C.A. No. 5596-R) for the losses and claims and damages resulting from an occurrence on January 22, 1967, at its Mount Storm Power

Station, Mt. Storm, West Virginia, which claims are more fully referred to and described in the various pleadings in the aforesaid Civil Action No. 220-71-R.

Virginia Electric And Power Company

By /s/ Illegible
Vice President

Attest:

/s/ S. B. Robertson
Secretary

(Corporate Seal)

COOPERATION AGREEMENT

Filed October 2, 1972

In order to induce Insurance Company of North America (hereinafter the "Insurer") to conclude at this time a final settlement of all of the remaining claims asserted by Virginia Electric and Power Company (hereinafter "Vepco") against the Insurer on Policy No. CX-10-X-196 in the United States District Court for the Eastern District of Virginia, Richmond Division, Civil Action No. 220-71-R, Vepco hereby agrees to cooperate fully with the Insurer in the prosecution of their third-party claim against Westinghouse Electric Corporation (hereinafter "Westinghouse") and/or Stone and Webster Engineering Corporation (hereinafter "S. & W.") in said action and in the separate action in said Court under the short style of *Vepco for the use, etc.* v. *Westinghouse and S. & W.* (C.A. No. 147-69-R) specifically including the following:

(1) Vepco will make available to the Insurer or their

attorneys all documents in its possession or control or in the possession or control of its attorneys or agents which may relate in any way to said claim of the Insurer against Westinghouse and/or S. & W. whether or not such documents have heretofore been produced or marked as exhibits in depositions in said actions or in the related civil action in said Court styled *Vepco* v. *Continental Insurance Co., et al* (C.A. 5596-R), including the work product of Vepco's attorneys.

(2) Vepco will produce at reasonable times and places, on request of the Insurer before or during trial, all employees under its control who have or may have information relating to the claim against Westinghouse and/or S. & W., whether for discussion and consultation with the Insurer's counsel in preparation for testimony or for the presentation of testimony in depositions or at the trial and shall make available to the Insurer, on reasonable request, such Vepco personnel as may be capable of providing expert advice and assistance, before and during trial in connection with the prosecution of the cause of action against Westinghouse and/or S. & W. Vepco shall make no charge for the time of its officers or employees. The Insurer will reimburse Vepco personnel for any travel or maintenance expense which they may incur.

(3) Vepco will permit representatives of the Insurer to inspect the Mt. Storm power plant at reasonable times and in such reasonable fashion as to avoid interference with plant operations.

(4) Vepco represents that the only technical advisor not regularly employed by it who has been consulted by Vepco or by its attorneys in connection with any phase of said action or in connection with the preparation therefor is

Alexander Kusko. At the request of the Insurer, Vepco agrees to introduce the attorneys for the Insurer to said technical advisor, to release him for use by the Insurer in connection only with said claim against Westinghouse and/or S. & W. at the sole expense of the Insurer for all services rendered after the date hereof, and to assist the Insurer in inducing said technical advisor to render such services, should any inducement be necessary.

(5) Vepco agrees to execute such additional papers and to take such additional steps in said Civil Action Nos. 220-71-R and 147-69-R (at the sole expense of the Insurer) as in the opinion of counsel for the Insurer may be reasonably necessary to implement said settlement or to assist the Insurer in the prosecution of its claim against Westinghouse. Such steps shall include, but not be limited to, amendment of Vepco's complaint in order to assert a cause of action against Westinghouse and/or S. & W., the substitution of counsel designated by the Insurer for Vepco's present counsel for the prosecution of such cause of action against Westinghouse and/or S. & W. and entering into a stipulation discontinuing the prosecution of the cause of action asserted by Vepco against the Insurer in said action.

(6) Vepco covenants that it has not made any settlement with Westinghouse and/or S. & W., has given no release to either, and will make no such settlement nor give such release with respect to the claims against either to which the Insurer by instruments of even date herewith are subrogated, without the written consent of the Insurer. Vepco also agrees that the conduct of the continuing action to recover against Westinghouse and/or S. & W. for such claims shall be under the exclusive direction and control of the Insurer and in the event of settlement Vepco will

execute a release therefor to Westinghouse and/ or S. & W. in the usual form at the request of the Insurer.

(7) Vepco and I.N.A. further agree that counsel for I.N.A. shall represent its claims, if any, against Westinghouse and/or S. & W. for uninsured loss, claim for which is in the sum of $150,000.00, but it shall be under no obligation for costs and expenses incurred in the prosecution of such claims conjunctively with those to which I.N.A. is subrogated.

Virginia Electric and Power Company

By /s/ L. G. Parrish
Vice President

JAN 28

MICHAEL RODAK, JR.

In The

Supreme Court of the United States

October Term, 1973

No. 73-1013

STONE & WEBSTER ENGINEERING CORPORATION,
Petitioner,

v.

VIRGINIA ELECTRIC & POWER COMPANY,
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

AND

No. 73-1014

WESTINGHOUSE ELECTRIC CORPORATION,
Petitioners,

v.

VIRGINIA ELECTRIC AND POWER COMPANY,
WHO SUES FOR THE USE AND BENEFIT OF
INSURANCE COMPANY OF NORTH AMERICA,
Respondent.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

Page

REASONS FOR DENYING THE WRIT 2

CONCLUSION 10

APPENDIX

Rules 17 and 19, Fed. R. Civ. P. ..... App. 1

CERTIFICATE OF SERVICE ..... App. 5

TABLE OF CITATIONS

Cases

Askey v. C&M Service, 45 F.R.D. 242 (M.D. Pa. 1968) 8

Celanese Corp. v. John Clark Indus., Inc., 214 F.2d 551 (5th Cir. 1954) 8

City Stores Co. v. Lerner Shops, Inc., 410 F.2d 1010 (D.C. Cir. 1969) 8

Gas Service Co. v. Hunt, 183 F.2d 417 (10th Cir. 1950) 8

Kramer v. Caribbean Mills, 394 U.S. 823 (1969) 9

McWhirter v. Otis Elevator Co., 40 F. Supp. 11 (W.D. S.C. 1941) 8

Morelli v. Northwest Engineering Corp., 30 F.R.D. 522 (E.D. Wisc. 1962) 6

Northboro Apartments, Inc. v. Wheatland Tube Co., 198 F. Supp. 245 (E.D. Pa. 1961) 8

Peoples Loan & Finance Corp. v. Lawson, 271 F.2d 529 (5th Cir. 1959) 8

Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968) 3, 4, 6

Southern Nat. Bank of Houston, Tex. v. Tri Financial Corp., 317 F. Supp. 1173 (S.D. Tex. 1970) 10

Page

Strawbridge v. Curtiss, 3 Cranch 267 (1806) 5

Sunray Oil Corp. v. Allbritton, 187 F.2d 475 (5th Cir. 1951) ..6, 7, 8

United States v. Aetna Cas. & Sur. Co., 338 U.S. 366 (1949) ..2, 3, 4

Urrutia Aviation Enterprises, Inc. v. B. B. Urson & Assoc., 406 F.2d 769 (5th Cir. 1969) 10

Watsontown Brick Co. v. Hercules Powder Co., 201 F. Supp. 343 (M.D. Pa. 1962) 6

Rules

Fed. R. Civ. P. 17 .....3, 5, 6, 7, 9

Fed. R. Civ. P. 19 .....2, 3, 4, 6

U.S. Sup. Ct. 19 2

U.S. Sup. Ct. 24 2

Statutes

28 U.S.C. § 1346(b) 2

28 U.S.C. § 2674 2

31 U.S.C. § 203 2

Other Authorities

Kennedy, Federal Rule 17(a): Will the Real Party in Interest Please Stand?, 51 Minn. L. Rev. 675 (1967) 6

C. Wright, Law of Federal Courts, (1970 ed.) 5

C. Wright and A. Miller, Federal Practice and Procedure 5, 6, 10

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BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Respondent respectfully urges that the two above petitions are not well taken, that the opinion below is plainly correct, and that no writ of certiorari should be issued on either petition. Our presentation will be addressed to both petitions without distinction between them.

REASONS FOR DENYING THE WRIT

I.

The Fourth Circuit's Decision Does Not Conflict With Previous Decisions Of The Supreme Court Or With The Interpretations Given To Rules 17(a) And 19, Federal Rules Of Civil Procedure.

Counsel for Virginia Electric and Power Company (hereinafter VEPCO) believe that their legal arguments, for the most part, are adopted, amply set out and even expanded upon somewhat in the opinions of the district court and the court of appeals. These opinions are included in the appendices of the petitioners' briefs when reference to them is needed. In view of this fact, counsel will attempt to limit argument now as provided in U.S. Sup. Ct. Rules 19 and 24, 28 U.S.C.

The decision of the circuit court in the case at bar in no way conflicts with the decision of this Court in *United States* v. *Ætna Cas. & Surety Co.*, 338 U.S. 366 (1949). The *Ætna* cases (there were four on appeal encompassing varied factual situations) arose under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b) and 2674) as suits by partially or fully subrogated insurance companies against the United States. These insurer subrogees were seeking the damages suffered by the subrogor at the hands of government employees. The United States asserted two defenses to prevent these suits by subrogees:

(1) attacking the subrogation arrangement under the dictates of the Anti-Assignment Act (31 U.S.C. § 203) (an act designed to prevent assignments for the purpose of influence peddling) and

(2) saying that the insurer was not a real party in interest under Rule 17(a) Fed. R. Civ. P.

There was no possibility that diversity would be destroyed because of the insurers' citizenships since the Federal Tort Claims Act provides that the federal courts shall have *exclusive jurisdiction* of all such suits. The *Ætna* Court held that transfers by operation of law, such as subrogation, do not fall within the category of evils which the Anti-Assignment Act was designed to prevent. Further, the Court found that the insurers and the insureds were both real parties in interest under Rule 17(a) and could pursue their claims in their own names as necessary parties. At this point, in the opinion, though the Court was not really called upon to say more, it went on to explain in a footnote that the insured on the one hand, and the insurer on the other were ". . . clearly not 'indispensable' parties . . ." in an action brought by the other. *Ætna, supra,* at 382 n. 19. Also the Court recognized that joinder of these parties could not be determined solely by Rule 17(a) but that 17(a) must necessarily be reconciled with Rule 19(b) Fed. R. Civ. P. *Id.* at 382. This homage by the Court to Rule 19 cannot be fully appreciated unless one realizes that *Ætna* was decided in 1949, long before the 1966 Revision to Rule 19 relaxed the joinder requirements. See App. p. 4. Since this 1966 Revision and the decision of this Court in *Provident Tradesmens Bank & Trust Co.* v. *Patterson,* 390 U.S. 102 (1968), the courts are allowed far more latitude as to joinder and as to the practical considerations to be weighed in making the joinder decision. See Westinghouse App. pp. 9-12.

The *Ætna* Court fully realized that in suits against the United States under the Tort Claims Act, there would be cases in which the government could be subjected to multiple actions. 338 U.S. at 382. This drawback was regrettable and was not cited as the preferred and most economical policy for court administration—the desired policy, of course, being the avoidance of a multiplicity of suits. Never-

theless, Westinghouse seizes upon this language in *Ætna* in an effort to split the one federal action before this Court into a Medusa's head of state actions. All along Westinghouse and Stone & Webster have been arguing that the fear of double claims is what made them seek joinder of Insurance Company of North America (hereinafter INA). No wonder the opinion below dealt with multiple claims. This is what the petitioners have previously advanced as their key to dismissal. They now wish to construe to their ends a dissertation by the court below on multiple claims, the petitioners, themselves, elicited. Their intentions now in urging the opposite result are tainted with motives that are more obstructionistic than they are genuine examples of the quest for a forum to decide the issues. By this effort to appeal from an interlocutory appeal, the petitioners are grasping for yet another decision point to postpone the day of reckoning when the merits of the case must be dealt with. The *Provident* Court understood the objecting party's reasoning and disapproved of it in the following passage. "Its [the party objecting to non-joinder] only concern with the absence of Dutcher [the non-diverse party sought to be joined] was and is to obtain a windfall escape from its defeat at trial." *Provident, supra* at 112. As indicated by the Fourth Circuit, respondent would be left with no way to pursue its entire claim, which is essentially interstate in character, if the present action is not allowed to continue. See Westinghouse App. p. 12.

This factor of an alternate remedy is just one of the concerns of Rule 19, along with the multiple claims which the court below considered in making its decision. It is obvious from the Fourth Circuit's opinion that it weighed all the factors set out in Rule 19 and that the decision was not based solely on eradicating the dangers of double liability. See Westinghouse App. pp. 11-12.

Westinghouse in its petition at page 6 says that the court of appeals "disregarded" Rule 17(a) and, by their "avoiding" it, escaped the workings of *Strawbridge* v. *Curtiss,* 3 Cranch 267 (1806). A mere perusal of the opinion below discloses that this charge is not well founded. See Westinghouse App. p. 8 n. 13. What the court did was to begin its examination of the problem of joinder by reference to Rule 17. When the court reached the impasse which Rule 17 presents when it indicates joinder of a reluctant or non-diverse party, it looked, as it must, to Rule 19. Under Rule 19, the court of appeals meticulously satisfied itself that no undeserved harm would fall on Westinghouse and Stone & Webster by allowing the district court's decision to stand and the action to continue without joinder of INA. But Westinghouse and Stone & Webster seem to consider Rule 17 to be procedural Rosetta Stone to be used in the decipherment of legal conundrums, without reference to and quite apart from the other rules of procedure and decisions interpreting them. The Fourth Circuit correctly refused to read Rule 17 in a vacuum and thereby reach the absurd results foisted on this Court by Westinghouse and Stone & Webster. See Westinghouse App. p. 9.

Charles Alan Wright in his treatise describes the procedure which is required under the rules.

> Once the requirements of Rule 17 have been complied with, and it has been decided that a particular individual or entity is a party in interest with capacity to sue or be sued, it is necessary to go one more step and decide whether the person has such a strong interest in the litigation that his joinder ought to be compelled. C. Wright, Law of Federal Courts, (1970 ed.) at 296.

The author in an expanded work goes on to say that

> . . . the question of who should or may be joined in

> the action must be determined under Rule 19 and Rule 20 rather than Rule 17(a). [*Watsontown Brick Co.* v. *Hercules Powder Co.*, 201 F. Supp. 343 (M.D. Pa. 1962); *Morelli* v. *Northwest Engineering Corp.*, 30 F.R.D. 522 (E.D. Wisc. 1962)] C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1543 at 646 (hereinafter cited as *Wright & Miller*).

Another commentator concludes:

> [i]n sum, Rule 17(a) should not be read as an absolute exception which allows exclusion or compels joinder apart from Rule 19. Perhaps the inconsistencies between Rule 17(a) and 19 could best be reconciled by restating Rule 17(a) as a permissive joinder rule. Kennedy, *Federal Rule 17(a); Will the Real Party in Interest Please Stand?*, 51 Minn. L. Rev. 675, 680 (1967).

Thus it is clear that when the limited purpose of Rule 17 has been fulfilled, the courts must, as did the district and circuit courts below, apply the practical solutions provided by Rule 19 and expounded upon by this Court in the *Provident* case. See Westinghouse App. p. 9.

II.

The Fourth Circuit's Decision Does Not Conflict With The Decisions Of The Other Circuit Courts.

Westinghouse cites *Sunray Oil Corp.* v. *Allbritton*, 187 F.2d 475 (1951) as an example of further conflict with the decision below. *Sunray* involved a suit by a worker Allbritton against a contractor Sunray, on whose oil derrick Allbritton was injured while in the scope of his employment in Texas with an independent contractor. Allbritton was partially compensated for his injuries pursuant to the Texas Workmen's Compensation Insurance carried by his em-

ployer, the independent contractor. The workmen's compensation carrier attempted by agreement with Allbritton (without joining with him in the suit and, in fact, refusing to join therein) to have him recover its portion of the claim against the contractor. The carrier sought this relief under the theory that Allbritton was its trustee (as provided in Rule 17) for the recovery of the compensation paid to him. There was no mention of any diversity problem. In rejecting this argument and holding that the judgment be reduced by the amount of the carrier's claim, the court in the following language referred to the substantive state rights created. ". . . [I]t is now settled by the Texas law that the employee's right to recover against third persons is limited to damages in excess of the compensation paid to him." *Sunray, supra* at 477.

Counsel for VEPCO certainly do not contend that one who does not have the substantive right to sue may maintain an action, but the Fourth Circuit in its opinion properly found that

> . . . VEPCO, as subrogor, is entitled under the substantive law [of Virginia] to bring suit for its entire loss. VEPCO, being entitled to enforce the right, may bring their action even though INA will ultimately receive the major portion of any recovery. See Westinghouse App. p. 7.

Though interpretation of the substantive law of Virginia is not the proper subject of this brief, counsel felt constrained by Westinghouse's misplaced reliance on *Sunray* to provide at least the short rejoinder above.

In addition to the factual and substantive law differences between *Sunray* and the case before this Court, there are later opinions by the Fifth Circuit Court of Appeals which illustrate that court's understanding that the law of the

forum governs what claims may properly be pursued and by whom. *Peoples Loan & Finance Corp.* v. *Lawson*, 271 F.2d 529 (5th Cir. 1959) (distinguishing *Ætna*); *Celanese Corp.* v. *John Clark Indus., Inc.*, 214 F.2d 551 (5th Cir. 1954); see Westinghouse App. p. 10 n. 17. The Fifth Circuit's view does not clash with the principles stated by the Fourth Circuit in the case at bar. Moreover, there is no indication that the Fifth Circuit is or was confused, even at the time of its 1951 *Sunray* decision, in its approach to the problems of joinder or non-joinder of a real party in interest.

Just as *Sunray* is distinguishable on its facts and law, so are the rest of the cases cited by Westinghouse for the proposition that Rule 17(a) must be read apart from the other rules.[1] Broadly, these cases can be distinguished by the fact that none of them deals with an absent party whose joinder would destroy diversity. Thus the workings of Rule 19 are not called into play. The decisions themselves reflect their limited application. In *Gas Service Co.* v. *Hunt*, 183 F.2d 417 (10th Cir. 1950) the court held that ". . . *with certain exceptions* not having material bearing here, upon timely motion of the alleged wrongdoer, the . . . [insurer subrogee] should be joined as a party." *Id.* at 419 (emphasis added). This is an obvious reference to the fact that no diversity problems existed in joining the insurer and this was in 1950 before the revision to Rules 17(a) and 19! The decision in *City Stores Co.* v. *Lerner Shops, Inc.*, 410 F.2d 1010 (D.C. Cir. 1969) cited by Westinghouse is even less persuasive. Not only was there no diversity quandary in *Lerner*, but it also was a case of full subrogation.

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[1] *Gas Service Co.* v. *Hunt*, 183 F.2d 417 (10th Cir. 1950); *City Stores Co.* v. *Lerner Shops, Inc.*, 410 F.2d 1010 (D.C. Cir. 1969); *Askey* v. *C & M Service*, 45 F.R.D. 242 (M.D. Pa. 1968); *Northboro Apartments, Inc.* v. *Wheatland Tube Co.*, 198 F. Supp. 245 (E.D. Pa. 1961); *McWhirter* v. *Otis Elevator Co.*, 40 F. Supp. 11 (W.D. S.C. 1941).

III.

Nominal Parties, Collusion And Ratification.

Stone & Webster attempts to gain the attention of this Court through the introduction of a line of cases dealing with nominal parties and diversity. Stone & Webster Petition pp. 5-6. A reading of these cases reveals that the nominal parties concerned are administrators, governors, justices of the peace, trustees and other uninterested functionaries, acting in their official capacities as provided by state and federal law. It is through these functionaries—legal fictions really—that the substantive interest of the aggrieved party may be pursued. VEPCO as a partial subrogor is not such a nominal party, since it is the repository of the legal right of action, has a substantial claim in its own right and is the foundation upon which rests the claim of any subrogee. See Westinghouse App. p. 7 text and n. 9.

In a like manner, Stone & Webster attempts to raise the ugly head of collusion in alluding to this Court's decision in *Kramer* v. *Caribbean Mills, Inc.,* 394 U.S. 823 (1969), holding invalid a collusive assignment to create diversity jurisdiction. There has never been any collusive assignment presented which could lead to the mention of collusion as an issue in the case at bar. Subrogation in Virginia comes about by operation of law. The fact that VEPCO and INA formalized this basic principle does not make it any less valid. See Westinghouse App. p. 7 n. 9.

Rule 17(a) itself provides yet another procedure by which the protestations of the petitioners may be calmed. By amendment in 1966 the following sentence was added to Rule 17(a).

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for *ratification* of commencement of the action by, or

> joinder or substitution of, the real party in interest; and such ***ratification,*** joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest. Rule 17(a) Fed. R. Civ. P. (emphasis added).

Ratification has been approved by the courts and included in *Wright & Miller* as a viable alternative to joinder. *Wright & Miller* provide this background and explanation:

> Formal joinder or substitution of the real party in interest will not be necessary when he ratifies the commencement of the action. The reference to "ratification" in Rule 17(a) seems to be a carryover from the original draft of the sentence added in 1966, which was to apply only to certain maritime proceedings, and probably was intended to adopt the procedure in salvage actions by which non-parties seek their share of the recovered property. Nonetheless, some federal courts have interpreted the words to validate an arrangement by which the real party in interest authorizes the continuation of an action brought by another and agrees to be bound by its result, thereby eliminating any risk of multiple liability. [*Southern Nat. Bank of Houston, Tex.* v. *Tri Financial Corp.*, 317 F. Supp. 1173, 1186 (S.D. Tex. 1970)] *Wright & Miller* § 1555 at 709.

Knowing that INA had ratified and agreed to be bound by any decision in the case at bar, the Fourth Circuit lent its weight to the ratification solution in observing that ". . . the subrogee may agree to be bound by the judgment . . ." and thus satisfy the requirements of Rule 17. See Westinghouse App. p. 9 n. 15; *Urrutia Aviation Enterprises, Inc.* v. *B. B. Urson & Assoc.*, 406 F.2d 769 (5th Cir. 1969).

CONCLUSION

Westinghouse and Stone & Webster urge what they term "reality" on this Court. In fact it is VEPCO which has

made full voluntary disclosure of the interests of INA and confronted the courts with the realities. Reality here is that both the petitioners, though only one shares citizenship with INA, are trying to frustrate the greater part of a claim which has been lodged against them. Petitioners say this maneuver is justified because part of the loss, it is alleged they caused, was insured by a non-diverse company to Westinghouse. This accident of insurance should not be allowed to impede an action essentially interstate in character—an action which was begun in 1967 and can now be ended once and for all in federal court or, failing that, probably not at all at this late date.

As demonstrated no conflict exists between the decision below and the decisions of this Court or between the decision below and those of any of the courts of appeals. Nor was the interpretation given to Rules 17(a) and 19 by the Fourth Circuit incorrect. Nor did the Court "disregard" or "avoid" Rule 17. In short, the Fourth Circuit was plainly right in upholding the decision of the district court.

For these reasons the writ of certiorari should be denied.

Respectfully submitted,

VIRGINIA ELECTRIC AND POWER COMPANY who sues for the use and benefit of Insurance Company of North America

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APPENDIX

FEDERAL RULES OF CIVIL PROCEDURE

Rule 17

Parties Plaintiff And Defendant; Capacity

(a) Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action has been commenced in the name of the real party in interest.

(b) Capacity to Sue or be Sued. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United

States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U.S.C. §§ 754 and 959(a).

(c) Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have a duly appointed representative he may sue by his next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent person. As amended Dec. 27, 1946, Dec. 29, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966.

1949 Amendment

Deleted the words "Rule 66" at the end of subdivision (b) and substituted "Title 28, U.S.C., §§ 754 and 959(a)."

1966 Amendment

Inserted in subdivision (a) the word "bailee"; and added the third sentence.

Rule 19

Joinder Of Persons Needed For Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1)

in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in subdivision (a) (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

(c) Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the

pleader, of any persons as described in subdivision (a) (1)-(2) hereof who are not joined, and the reasons why they are not joined.

(d) Exception of Class Actions. This rule is subject to the provisions of Rule 23.

1966 Amendment

Gave the rule its present wording. Prior thereto the rule provided:

"*(a) Necessary Joinder.* Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

"*(b) Effect of Failure to Join.* When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons.

"*(c) Same: Names of Omitted Persons and Reasons for Non-Joinder to be Pleaded.* In any pleading in which relief

is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted."

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing brief and appendix were delivered to James L. Sanderlin, Esquire, McGuire, Woods & Battle, 1400 Ross Building, Richmond, Virginia 23219, counsel for petitioner, Westinghouse Electric Corporation and three copies were delivered to Charles W. Laughlin, Esquire, Christian, Barton, Parker, Epps & Brent, 1200 Mutual Building, Richmond, Virginia 23219, counsel for petitioner, Stone & Webster Engineering Corporation, on or before January 28, 1974.

I further certify that I am a member of the Bar of the Supreme Court of the United States, and that all parties required by law to be served have been served.

EDWARD A. MARKS, JR.
Of Counsel for Respondent